Amanah Raya Bhd (representative for Cheng Song Lim, deceased) v Ong Chin Hoo

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO P-02(IM)(NCVC)-1825–09 OF 2017
TENGKU MAIMUN, NALLINI PATHMANATHAN AND ZABARIAH YUSOF JJCA
11 FEBRUARY 2019

Civil Procedure — Striking out — Appeal against order dismissing striking out — Plaintiff brought action against defendants for specific performance of sale and purchase agreement and ancillary orders — High Court dismissed defendants' application to strike out plaintiff's writ of summons and statement of claim — Whether first defendant's striking out application was irregular — Rules of Court 2012 O 18 r 19(1)

Succession — Administration — Sale of properties — Beneficiaries entered into sale and purchase agreement as vendors — Whether beneficiaries had power to sell property in the estate of the deceased before obtaining probate — Probate and Administration Act 1959 ss 39, 60(3), 60(4) & 68 — National Land Code s 346

This was an appeal by the first defendant against the decision of the High Court which dismissed its application to strike out the plaintiff's claim against it pursuant to O 18 r 19(1)(a) and/or (d) of the Rules of Court 2012 ('the ROC 2012'). Chong Siew Koey ('CSK') and Choong Siew Thean ('CST') were a couple who both passed away without wills, collectively leaving behind six properties. Cheng Song Lim ('CSL'), Chen Weng Seng ('CWS'), Chen Thee Sim ('the third defendant') and Cheng Gnek Goh ('the fourth defendant') were the lawful heirs of CSK and CST. These four persons entered into a sale and purchase agreement ('the SPA') as vendors to sell the aforesaid six properties to Ong Chin Hoo ('the plaintiff'). They did so in their capacity as beneficiaries of CSK and CST. According to Preamble 5 of the SPA, the vendors were obliged to diligently apply for the grant of letters of administration in respect of the estate of CSK and CST as well as the requisite court order for the sale of the property to the plaintiff or his nominee. However, the vendors failed to pursue any application to obtain the grant of letters of administration. Further, CWS was represented by Chen Kim Hock ('the second defendant') while CSL was represented by Amanah Raya Bhd ('the first defendant') as both of them passed away before the transaction could be completed. The plaintiff filed this claim seeking specific performance of the SPA and ancillary orders. The defendants respectively filed applications to strike out the plaintiff's writ of summons and statement of claim but was dismissed by the High Court. Hence, this appeal by

the first defendant representing the estate of CSL. The issues for consideration were: (a) whether the first defendant's striking out application was irregular; and (b) whether beneficiaries had the power to sell property in the estate of the deceased before obtaining probate.

Held, allowing the appeal and setting aside the decision of the High Court:

(1) Judicial time and costs ought not to be expended on filing objections to and raising appeals in regard of technical non-compliance as this would delay the hearing and the ultimate disposal of the case on its merits. The plaintiff was misguided in relying on *Pegasus Engineers Sdn Bhd v Sambu (M) Sdn Bhd* [1998] 4 MLJ 129 for the proposition that a striking out application could not be premised on limb (a) as well as (b) and (d) of O 18 r 19(1) of the ROC 2012. Nowhere in the judgment was it stated that a striking out application could not combine O 18 r 19(1)(a) with other limbs under O 18 r 19 of the ROC 2012. The case of *See Thong & Anor v Saw Beng Chong* [2013] 3 MLJ 235 made it clear that the combination of various limbs of O 18 r 19(1) of the ROC 2012 in one single application should not be deemed to render that application irregular and defective (see paras 27, 30 & 34).

(2) The vendors who were mere beneficiaries were not entitled to sell their future interest in the properties which they expected to inherit. They should have waited until the grant of the letters of administration was issued and after the appointed administrator completed the distribution of the properties to them, before executing any sale and purchase agreements in respect of the estate properties. The court was unable to concur with the respondent that these were contingent contracts, and more importantly that the respondent had the requisite capacity to contract. The net result was that the SPA was null and void for lack of capacity. Therefore, the plaintiff's action in seeking specific performance of the SPA was obviously unsustainable and the striking out application filed by the first defendant should be allowed (see paras 54–56 & 59).

[Bahasa Malaysia summary

Ini adalah rayuan oleh defendan pertama terhadap keputusan Mahkamah Tinggi yang menolak permohonannya untuk membatalkan tuntutan plaintif terhadapnya menurut A 18 k 19(1)(a) dan/atau (d) Kaedah-Kaedah Mahkamah 2012 ('KKM 2012'). Chong Siew Koey ('CSK') dan Choong Siew Thean ('CST') adalah pasangan yang kedua-duanya meninggal tanpa wasiat, secara kolektif meninggalkan enam hartanah. Cheng Song Lim ('CSL'), Chen Weng Seng ('CWS'), Chen Thee Sim ('defendan ketiga') dan Cheng Gnek Goh ('defendan keempat') adalah waris CSK dan CST. Keempat-empat mereka ini menandatangani perjanjian jual beli ('SPA') sebagai penjual untuk menjual enam hartanah tersebut kepada Ong Chin Hoo ('plaintif'). Mereka melakukannya dengan kapasiti mereka sebagai benefisiari CSK dan CST.

Mengikut Mukadimah 5 PJB, penjual diwajibkan untuk memohon untuk pemberian surat kuasa pentadbiran berkenaan dengan hartanah CSK dan CST serta perintah mahkamah yang diperlukan untuk penjualan hartanah itu kepada plaintif atau penamanya. Walau bagaimanapun, penjual gagal meneruskan sebarang permohonan untuk mendapatkan pemberian surat kuasa pentadbiran. Selanjutnya, CWS diwakili oleh Chen Kim Hock ('defendan kedua') manakala CSL diwakili oleh Amanah Raya Bhd ('defendan pertama') kerana kedua-duanya meninggal dunia sebelum transaksi itu dapat diselesaikan. Plaintif memfailkan tuntutan ini untuk mendapatkan pelaksanaan spesifik SPA dan perintah sampingan. Defendan masing-masing memfailkan permohonan untuk membatalkan writ saman dan penyataan tuntutan plaintif tetapi telah ditolak oleh Mahkamah Tinggi. Oleh itu, rayuan oleh defendan pertama mewakili harta pusaka CSL. Isu-isu untuk pertimbangan adalah: (a) sama ada permohonan pembatalan defendan pertama adalah tidak teratur; dan (b) sama ada benefisiari mempunyai kuasa untuk menjual hartanah dalam harta pusaka si mati sebelum memperoleh probet.

Diputuskan, membenarkan rayuan dan mengetepikan keputusan Mahkamah Tinggi:

(1) Masa dan kos kehakiman tidak sepatutnya dihabiskan untuk pemfailan bantahan dan menimbulkan rayuan berkenaan dengan ketidakpatuhan teknikal kerana ini akan menangguhkan perbicaraan dan pelupusan akhir kes itu. Plaintif telah salah dengan bergantung kepada *Pegasus Engineers Sdn Bhd v Sambu (M) Sdn Bhd* [1998] 4 MLJ 129 untuk cadangan bahawa permohonan pembatalan tidak boleh didasarkan pada cabang (a) serta (b) dan (d) A 18 k 19(1) KKM 2012. Tiada di mana-mana dalam penghakiman yang menyatakan bahawa permohonan pembatalan tidak dapat menggabungkan A 18 k 19(1)(a) dengan cabang lain di bawah A 18 k 19 KKM 2012. Kes *See Thong & Anor v Saw Beng Chong* [2013] 3 MLJ 235 menjelaskan bahawa gabungan pelbagai cabang A 18 k 19(1) KKM 2012 dalam satu permohonan tunggal tidak boleh dianggap sebagai permohonan yang tidak teratur dan rosak (lihat perenggan 27, 30 & 34).

(2) Penjual yang menjadi benefisiari semata-mata tidak berhak untuk menjual kepentingan masa depan mereka terhadap hartanah yang mereka jangkakan untuk diwarisi. Mereka sepatutnya menunggu sehingga pemberian surat kuasa pentadbiran dikeluarkan dan selepas pentadbir dilantik menyempurnakan pembahagian hartanah itu kepada mereka, sebelum melaksanakan perjanjian jual beli untuk harta pusaka. Mahkamah tidak dapat bersetuju dengan responden bahawa ini adalah kontrak kontinjen, dan lebih penting lagi bahawa responden mempunyai keupayaan untuk kontrak. Keputusan akhir adalah PJB adalah batal dan tidak sah kerana ketiadaan kapasiti. Oleh itu, tindakan plaintif dalam

memohon pelaksanaan spesifik PJB jelas tidak dapat dipertahankan dan permohonan pembatalan yang difailkan oleh defendan pertama harus dibenarkan (lihat perenggan 54–56 & 59).]

Cases referred to

Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36, SC (refd)

Chor Phaik Har v Farlim Properties Sdn Bhd [1997] 3 MLJ 188, FC (folld)

Datin Paduka Phang Oi Choo @ Phang Ai Tu v Tan Sri Datuk G Gnanalingam and other appeals [2017] 5 MLJ 800; [2017] 5 CLJ 1; [2017] 1 LNS 282, CA (refd)

Goh Keat Poh & Ors v Farlim Properties Sdn Bhd and other appeals [2009] 5 MLJ 449; [2012] 10 CLJ 70, CA (folld)

Kalung Makmur Sdn Bhd v Lo Yen Nyuk [2018] 2 MLJ 428; [2018] 1 CLJ 459; [2017] 1 LNS 1072, CA (refd)

Mak Siew Wei v Yeoh Eng Kong and other appeals [2018] MLJU 1770, CA (refd)

Norihan bt Talib (sued in her personal capacity and trading under the name 'Tanjung Trading') & Ors v Mohd Nasir bin Hassan & Ors (suing on their own behalf and for 420 others as per list at 'Appendix A') and another appeal [2018] 3 MLJ 670; [2018] 2 CLJ 66; [2017] 1 LNS 1274, CA (refd)

Om Cahaya Mineral Asia Bhd v Damansara Realty (Pahang) Sdn Bhd [2019] 1 MLJ 683; [2018] 5 CLJ 587; [2017] 1 LNS 2027, CA (refd)

Pegasus Engineers Sdn Bhd v Sambu (M) Sdn Bhd [1998] 4 MLJ 129, CA (consd)

See Thong & Anor v Saw Beng Chong [2013] 3 MLJ 235; [2012] 1 LNS 817, CA (consd)

Sinniah a/l Pampayan v Muthuvelu Pillai a/l Palanichamy Pillai [1997] 1 MLJ 403; [1996] 4 CLJ 538, CA (not folld)

Tan Wei Hong (a minor suing through guardian ad litem and next friend Chuang Yin E) & Ors v Malaysia Airlines Bhd and other appeals [2019] 1 MLJ 59; [2018] 9 CLJ 425; [2018] 1 LNS 1274, FC (refd)

Legislation referred to

Contracts Act 1950 ss 32, 33
National Land Code s 346, 346(2), (3)
Probate and Administration Act 1959 ss 39, 60, 60(3), (4), 68
Rules of Court 2012 O 18 r 19, O 18 r 19(1), (1)(a), (1)(b), (1)(d), (2)

Appeal from: Civil Suit No PA-22NCVC-135–07 of 2016 (High Court, Pulau Pianang)

Abdul Fareed Gafoor (VM Mohan, Fareed & Co) for the appellant.
Zakiah Mohammed (Gaik Teik Chee & Ho) for the respondent.

Nallini Pathmanathan JCA:

INTRODUCTION

[1] This is an appeal by the first defendant against the decision of the High Court which dismissed its application to strike out the plaintiff's claim against it pursuant to O 18 r 19(1)(a) and/or (b) and/or (d) of the Rules of Court 2012 ('the RC 2012'). We were of the view that the striking out application should have been allowed and we so ordered, accordingly reversing the decision of the High Court. The background facts are not in dispute and are set out below.

SALIENT FACTS

[2] Chong Siew Koey and Choong Siew Thean were a couple who both passed away without wills, collectively leaving behind six properties in Mukim 17, Daerah Seberang Perai with the following details:

No	Property	Registered owner
1	Lot No 90 under GM No 465	Chong Siew Koey
2	Lot No 91 under GM No 466	Chong Siew Koey
3	Lot No 93 under GM No 468	Chong Siew Koey
4	Lot No 106 under GM No 474	Choong Siew Thean
5	Lot No 136 under GM No 485	Choong Siew Thean
6	Lot No 1430 under GM No 726	Choong Siew Thean

[3] Cheng Song Lim, Chen Weng Seng, Chen Thee Sim ('the third defendant') and Cheng Gnek Goh ('the fourth defendant') were the lawful heirs of Chong Siew Koey and Choong Siew Thean. Each of them was entitled to a quarter (1/4) share of each property.

[4] These four persons entered into a sale and purchase agreement ('SPA') dated 15 September 2003 as vendors to sell the aforesaid six properties to Ong Chin Hoo ('the plaintiff') for the purchase price of RM1,162,080. They did so in their capacity as beneficiaries of Chong Siew Koey and Choong Siew Thean.

[5] Pursuant to the SPA, the plaintiff paid the deposit of 10% of the purchase price (RM116,208) to the vendors.

[6] According to Preamble 5 of the SPA, the vendors were obliged to diligently apply for the grant of letters of administration in respect of the estate of Chong Siew Koey and Choong Siew Thean as well as the requisite court order for the sale of the property to the plaintiff or his nominee.

[7] However, the vendors failed to pursue any application to obtain the grant of letters of administration. Further, Cheng Song Lim and Chen Weng Seng passed away before the transaction could be completed.

[8] Chen Weng Seng passed away on 3 November 2002 and is represented in this action by Chen Kim Hock, the second defendant.

[9] Cheng Song Lim passed away on 2 August 2012 without a will. His estate is represented in this action by Amanah Raya Bhd ('ARB'), the first defendant.

[10] The heirs of Cheng Song Lim declared that his assets and/or liabilities only amounted to cash assets in the sum of RM10,934.95. ARB completed the administration of the estate of Cheng Song Lim and closed his file on 8 January 2013.

[11] The plaintiff filed this claim seeking specific performance of the SPA and ancillary orders.

[12] ARB and the three other defendants to this claim respectively filed applications to strike out the plaintiff's writ of summons and statement of claim. In brief, they contended that at the time of executing the SPA, the four vendors lacked capacity to contract as they were neither the registered nor the lawful beneficial owners of the said properties. At the material time, the grant of letters of administration had not been obtained therefore they could not be regarded as the lawful beneficial owners. Therefore the plaintiff had no caveatable interest as the SPA was invalid.

[13] The first, second and fourth defendants also claimed that the plaintiff paid the deposit under an invalid SPA and that there was inordinate delay on the plaintiff's part in pursuing his claim for specific performance.

[14] The High Court dismissed all the striking out applications with costs.

[15] We are concerned here with the appeal filed by ARB representing the estate of Cheng Song Lim. ARB's striking out application (encl 31) prayed for the matter to be struck out under paras (a) and/or (b) and/or (d) of O 18 r 19(1) of the RC 2012. The relevant rules are set out below for ease of reference:

> O 18 r 19 Striking out pleadings and endorsements
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> (1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the endorsement, of any writ in the action, or anything in any pleading or in the endorsement, on the ground that-
>
> (a) it discloses no reasonable cause of action or defence, as the case may be;

A (b) it is scandalous, frivolous or vexatious;

(c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of the Court,

and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

[16] The plaintiff, in opposing the striking out applications, contended that as the vendors had accepted the deposit payment, they were now estopped from contending that they had no capacity to contract. The reason for the late filing of this action was because the plaintiff had allowed them more than sufficient time to resolve the grant of letters of administration for their deceased parents.

[17] The plaintiff contended that he was a bona fide purchaser for value but the defendants were attempting to invalidate the SPA because the said properties had increased in value.

[18] The High Court judicial commissioner ('JC') found that in the present case, the SPA clearly disclosed the capacity of parties and the fact that the grant of the letters of administration had yet to be obtained. The learned JC was of the view the issue of whether the plaintiff delayed commencing this action should be decided at a full trial. The vendors had failed to satisfy the court that the plaintiff's action against them was obviously unsustainable.

SUBMISSIONS BEFORE THE COURT OF APPEAL

[19] The plaintiff contended that the SPA was a valid transaction as it was a conditional or contingent contract as defined in ss 32 and 33 of the Contracts Act 1950 ('the CA 1950').

[20] On the other hand, ARB's main contention was that the SPA was entered into without an order sanctioning the sale either from the land administrator or the High Court. ARB relied on s 60 of the Probate and Administration Act 1959 (Revised 1972) ('the PAA 1959') which provides that only an administrator may sell land of a deceased, and that too with the permission of the court. In this case, the vendors had not even procured the grant of letters of administration, therefore they were not even administrators of the estate of the deceased persons.

[21] ARB also submitted that the plaintiff's claim was barred by laches. This action was filed on 20 July 2016, more than 13 years after the SPA was executed on 15 September 2003. ARB argued that the plaintiff who was legally represented and had not taken any reasonable actions to protect his rights, should be deemed to have waived his rights in the SPA.

[22] In reply, the plaintiff argued that if there is any delay, it is on the part of the vendors who have remained silent all these years without taking any steps to fulfil their obligations under the SPA. With regards to the first defendant specifically, the plaintiff's solicitors issued a letter dated 2 March 2015 to ARB requesting to be supplied with the information of the deceased Cheng Song Lim in order for the plaintiff to proceed with the necessary steps to complete the transaction. The plaintiff relied on the principle that 'equity will not allow a statute to be used as an engine of fraud'.

[23] ARB raised an objection that the plaintiff cannot advance the claim of unjust enrichment on the basis that the vendors had received the deposit payment, as the plaintiff had not included a prayer for the return of the monies he paid to the vendors. It is trite that parties are bound by their pleadings. In response, the plaintiff argued that the court has the inherent jurisdiction to prevent the abuse of process of court, whether pleaded or not.

[24] In addition, the plaintiff raised the issue of the irregularity of the present application as it combined 3 different limbs of O 18 r 19(1), ie (a) and/or (b) and/or (d). The plaintiff relied on the case of *Pegasus Engineers Sdn Bhd v Sambu (M) Sdn Bhd* [1998] 4 MLJ 129 (CA) for this proposition. In that case, as in the present case, the defendant there had used the phrase 'and/or' between the various limbs of O 18 r 19(1) pleaded. The plaintiff had objected because the use of the conjunction 'and' would mean that the supporting affidavit would be used even for limb (a) where affidavit evidence is inadmissible pursuant to O 18 r 19(2). The registrar and the High Court judge were of the view that the application ought to be struck out. Aggrieved, the defendant appealed to the Court of Appeal, which dismissed the appeal on the ground that it was too trivial.

OUR DECISION

[25] We first deal with the preliminary objection raised by the plaintiff, ie that ARB's striking out application is irregular.

The purported irregularity of ARB's striking out application

[26] In *Pegasus Engineers* (above), NH Chan JCA opined that having regard to the principle of 'de minimis non curat lex', the defendant ought not to have appealed for such a trifling matter. His Lordship held that the defendant could have simply refiled the striking out application and ensured that it omitted the word 'and' between limb (a) and (b), thus saving the time and costs involved in appealing against the High Court decision. Therefore the Court of Appeal dismissed the defendant's appeal.

[27] We are in whole-hearted agreement with His Lordship's statement. Judicial time and costs ought not to be expended on filing objections to and raising appeals in regard of technical non-compliance as this would delay the hearing and the ultimate disposal of the case on its merits.

[28] However, counsel for ARB brought a more recent case to the attention of the court. That is the judgment of the Court of Appeal in *See Thong & Anor v Saw Beng Chong* [2013] 3 MLJ 235; [2012] 1 LNS 817. Similarly, the defendant in that case filed a striking out application premised on three different limbs of O 18 r 19(1), ie (a) and/or (b) and/or (d). The High Court judge held that since parties had filed their affidavits, para (a) was no longer applicable. Therefore the judge went on to consider the application under paras (b) and (d) only. Finally, the High Court struck out the claim and the plaintiffs appealed. The Court of Appeal reversed the decision of the High Court as it was of the view that there were issues which ought to go for trial.

[29] In *See Thong* (above), Ramly Ali JCA (as His Lordship then was) elucidated the proper approach to be adopted in approaching striking out applications which are premised on more than one limb of O 18 r 19(1). His Lordship stated that the High Court judge was wrong to totally ignore para (a) since affidavits had been filed. What the High Court should have done was to first consider para (a) without referring to the affidavits, then go on to consider paras (b) and (d) with the benefit of the affidavits. The key passage in His Lordship's grounds is reproduced below:

> [9] An applicant for striking out under O 18 r 19 can rely on any one or more than one sub-paras (a)–(d). So far, there is no authority to say otherwise. *Halsbury's Laws of Malaysia* clearly confirms that an applicant under this rule is entitled to rely on any or all of the grounds specified in the rule. An application under this rule is not void and ineffective merely because sub-para (a) had been pleaded together with sub-paras (b)–(d). The only limitation imposed under sub-r (2) is that for an application under sub-para (a), no evidence is admissible. However, where the court proceeds to decide an application under any other subparagraph, affidavit evidence should be admissible. Even though sub-paras (b)–(d) are to be read disjunctively, it does not mean that an applicant cannot rely on more one sub-paragraph in his application. (see: *Malayan United Finance Bhd lwn. Cheung Kong Plantation Sdn Bhd dan Lain-Lain* [2000] 2 MLJ 38; [2000] 2 CLJ 601; *Pegasus Engineers Sdn Bhd v Sambu (M) Sdn Bhd* [1998] 4 MLJ 129 and *Malaysian Court Practice* 2007 Desk Ed (High Court) p 239).
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> [10] In the present case since the application by the respondent is also based on sub-para (1)(a), the learned judge should have dealt with the said sub-para notwithstanding the fact that both parties had filed their respective affidavits. Those affidavits are actually to be used for the other two sub-paras (b) and (d). What the learned judge should have done is to deal with the issue under sub-para (a) first and to ignore completely the two affidavits filed by the parties; before proceeding to deal with sub-paras (b) and (d).

[30] It will be noted that the case of *Pegasus Engineers* (above) had been considered by the Court of Appeal in *See Thong* (above). A proper reading of the grounds of NH Chan JCA in *Pegasus Engineers* (above) discloses that the plaintiff is misguided in relying on that case for the proposition that a striking out application cannot be premised on limb (a) as well as (b) and (d) of O 18 r 19(1). The Court of Appeal in *Pegasus Engineers* (above) dismissed the appeal because it was a waste of time and costs according to the 'de minimis' rule. Nowhere in the judgment of the Court of Appeal was it stated that a striking out application cannot combine O 18 r 19(1)(a) with other limbs under O 18 r 19.

[31] It behoves us at this point to reiterate the point we made in an earlier case of *Mak Siew Wei v Yeoh Eng Kong and other appeals* [2018] MLJU 1770 (unreported as at the date of this judgment, our decision in the four said appeals was delivered on 5 September 2018). The facts are irrelevant as that case was on re-amendment of pleadings. In that case, we adjourned for further submissions on a point of clarification. Some of the counsel neglected to revert with further submissions which could have assisted the court, while one counsel reverted by citing a case which had been overruled for the proposition which that counsel relied on before us. Our comments in that case bear repeating:

> Post-Script
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> [59] It is with some hesitancy that we bring up this post-script, applicable not only in the instant case, but recently in many cases that this court has had occasion to deal with. When learned counsel cite case-law to this court, albeit domestic or foreign cases, it is essential that they have ensured that the case cited has not been overturned, criticised or even distinguished by subsequent court decisions. The importance of doing so needs no underscoring. The correct standard to be adhered to albeit by counsel from the Bar or judicial officers from the Attorney-General's office is simply that it is inexcusable for a lawyer to fail as a matter of routine to study and examine all cited cases to ensure that there is no citation of a case as a 'precedent', when it no longer qualifies as such. Given the technology present today that duty is no longer as onerous as it once was. The use of Westlaw or Lexis Nexis and numerous other legal research engines allows this to be done with ease, so much so that a failure to carry out this exercise warrants genuine judicial concern as to whether an incorrect citation is inadvertent or deliberate. Both give rise to negative impressions and consequences, although the latter is considerably worse as it amounts to misleading the court. In short, the standard of reasonable diligence or inquiry into the law is expected of all lawyers addressing the courts.
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> [60] The rationale underlying the need for well-researched appellate advocacy is obvious. The courts are overburdened at the best of times, and in the context of the adversarial system, judges rely upon legal arguments and authorities put forward by counsel writing their judgments. Any slack in legal research or incorrect citations of case-law, particularly in novel or difficult areas of the law, may well result in a misstatement of the correct position in law.

A

> [61] The need for well-researched briefs and advocacy is a cornerstone of the administration of justice. In Malaysia, where the profession is fused such that any lawyer may appear before any level of the hierarchy of the courts, it is even more imperative that standards of advocacy are maintained at the highest levels, so as to ensure accuracy in the development of the law.

B

[32] In our present case, the plaintiff has misstated the principle to be gleaned from *Pegasus Engineers* (above). At the very least, the plaintiff misinterpreted the grounds of judgment of the learned Court of Appeal judge.

C

[33] When the grounds of judgment of both *Pegasus Engineers* (above) and *See Thong* (above) are properly appreciated, there is no conflict in the propositions they stand for. The proposition in *Pegasus Engineers* (above), despite being made 20 years ago in 1998, still holds water today — that just because there is a right of appeal even from decisions on interlocutory matters, it does not necessarily mean that this right MUST be exercised. And for very good reasons, too. When parties file interlocutory applications and the losing party appeals to the appellate court, this means a delay of the disposal of the full trial or hearing as all parties involved await the outcome of the appellate proceedings.

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E

[34] The case of *See Thong* (above) makes it crystal clear that the combination of various limbs of O 18 r 19(1) in one single application should not be deemed to render that application irregular and defective. The Court of Appeal has laid down the guidelines for the order of the various limbs to be considered — first, limb (a) should be considered without having regard to the affidavits, then only the court should proceed to consider the other limbs in light of the affidavit evidence.

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G

[35] However, we need to draw a distinction between the facts of *Pegasus Engineers* (above) where the defendant appealed against the High Court decision to dismiss its striking out application, and the facts of *See Thong* (above) where the plaintiffs appealed against the High Court decision to allow the defendant's striking out application. As clearly enunciated by the learned Court of Appeal judge in *See Thong* (above), where the court wrongly exercises its power to strike out a claim, the plaintiff would suffer an injustice. The relevant passage in the judgment of Ramly Ali JCA (as he then was) is set out below:

H

I

> [23] Judges dealing with striking out application under O 18 r 19 of the RHC must always bear in mind that the power to strike a case under the order without having to go for trial should be exercised sparingly and only in a plain and obvious case. The procedure is of a summary nature. The party affected should not be deprived of his right to have his case proceeded by a proper trial unless the claim is obviously unsustainable. The Federal Court in the case of *CC Ng & Brothers Sdn Bhd v*

Government of State of Pahang [1985] 1 MLJ 347, had said that 'the inherent power to dismiss an action summarily without permitting the plaintiff to proceed to trial is a drastic power. It should be exercised with utmost caution' — Per Seah FJ. It is a power which ought to be very sparingly exercised and only in very exceptional cases (per Lord Herschell in *Lawrence v Norrey* — as cited in *CC Ng & Brothers*).

[24] Some judges described the power to strike out the plaintiff's claim as 'draconian' — in the sense that the plaintiff is being deprived completely from having his day in the court of law to establish his claim by adducing evidence and calling of witnesses. If not properly exercised, the court in effect is closing its door for the plaintiff to have his recourse to justice. If the application by the defendant is dismissed, the case will still go for trial and the defendant will still have his second bite of the cherry during trial. On the other hand, if the application is allowed and the case is struck out (as in the present case before us) the plaintiff will obviously lose everything, particularly when the plaintiff cannot refile the claim because of limitation issue.

...

[26] Striking out applications under O 18 r 19(1) of the RHC should not be taken lightly by judges. No doubt, the application is recorded as an 'interlocutory matter' in the court dockets, but the effect of the striking out is far more serious and drastic compared to the decision after full trial. In full-trial cases, the plaintiff is given full chance and opportunity to establish and prove his claim before the court of law. However, in striking out proceedings, his claim is struck out even before he has the chance and opportunity to prove his case.

[36] We thus conclude the general principle to be gleaned from a reading of both *Pegasus Engineers* (above) and *See Thong* (above) is that where the High Court *dismisses* a striking out application, a defendant should give serious consideration whether to appeal or not. After all, the defendant is accorded another opportunity to restate his case which can be fully considered at trial. There are exceptions to this general proposition, for example the legal issue of locus standi in derivative actions where the general case law is not applicable. The reason for this general proposition is to save time and costs.

[37] However, if the High Court *allows* a striking out application, the plaintiff cannot be precluded from filing an appeal against that decision. The reason for this is because the plaintiff's action has been summarily struck out and the plaintiff has been deprived of a chance to present his case. The plaintiff should be afforded the opportunity to have the appellate court rectify matters where the High Court has erred in unjustly striking out the plaintiff's claim.

[38] Be that as it may, the purported irregularity of the striking out application is not the only issue for consideration in this case. We now proceed to consider some of the other issues.

A LIMITATION

[39] This issue was raised in submissions. However, the defendant did not plead the issue of limitation, therefore we did not consider it.

B *Do beneficiaries have the power to sell property in the estate of the deceased before obtaining probate?*

[40] The plaintiff argued that the SPA was a conditional or contingent C contract within the meaning of ss 32 and 33 of the CA 1950. Further, the plaintiff relied on the Court of Appeal case of *Sinniah a/l Pampayan v Muthuvelu Pillai a/l Palanichamy Pillai* [1997] 1 MLJ 403; [1996] 4 CLJ 538 (CA) in support of his contention that the vendors are entitled to sell their future right in the said properties with conditions attached to the agreement, D such as the condition to obtain the grant of letters of administration and the order for sale from court.

[41] In *Sinniah v Muthuvelu* (above), the Court of Appeal upheld the sale of land from the plaintiff to the second defendant even though the sale and E purchase agreement was for the plaintiff's future interest in the land in question. This was because the plaintiff was not yet the registered owner of the land which he sold to the second defendant. At that time, the land belonged to the state. The plaintiff had entered into an agreement with the State Government of Perak which granted him the right to own the land in the F future, provided he paid the monthly instalments and provided the full purchase price was paid off within 17 years. The High Court held that the sale was void. However, the Court of Appeal reversed that decision, holding that a sale of a contingent right is valid, but property could only pass from the plaintiff to the second defendant once the state government transferred the G property to the plaintiff. And this would only be done after the plaintiff complied with all the conditions stipulated in the agreement between him and the state government.

H **[42]** That case has not been overruled and is still good law. However, we reiterate what was stated above as to the duty of lawyers to assist the court and not misread a case. A quick reading of the judgment of KC Vohrah JCA in *Sinniah v Muthuvelu* (above) would have sufficed for the plaintiff's counsel to have realised a key distinction between the facts of that case and our present I facts — which is the fact that the property in that case was not a part of the unadministered estate of a deceased person, and the plaintiff in that case was not one of the beneficiaries of the deceased. Therefore, the case of *Sinniah v Muthuvelu* (above) is not applicable to the present case.

[43] In order to determine whether beneficiaries are entitled to sell their future interest in immovable property of the estate, we consider the relevant legislation as to probate as provided for under the PAA 1959 (Revised 1972).

[44] The owners of the said properties, Chong Siew Koey and Choong Siew Thean, both passed away intestate. Section 39 of the PAA 1959 (Revised 1972) provides that when a person passes away without leaving a will, all his property will first vest in ARB until the grant of letters of administration. After the grant of letters of administration, the deceased's property will vest in the administrator. This provision is set out below for ease of reference:

> 39 Vesting of property of an intestate
>
> (1) Where a person dies intestate his movable and immovable property until administration is granted in respect thereof shall vest in the Corporation in the same manner and to the same extent as it vests in the Probate Judge in England.
>
> (2) On the making of an order for a grant of administration by the Court all such property shall vest in the administrator.
>
> [Note: the word 'Corporation' is defined as ARB in section 2 which is the interpretation provision of the PAA 1959 (Revised 1972).]

[45] The natural result of the sequence of s 39 stated above where property of the deceased first vests in ARB, then the administrator of the deceased's estate, means that before the estate is administered, the property remains under ARB.

[46] As submitted by ARB, before any land of a deceased may be sold, the personal representative of the deceased must obtain permission of court. Section 60 of the PAA 1959 (Revised 1972) differentiates between the power of sale granted to executors and administrators. The former does not require court sanction to sell property of the deceased. The latter requires court sanction to do so. This is clear from a reading of the provisions of s 60(3) and (4), which are set out below for ease of reference:

> (3) A personal representative may charge, mortgage or otherwise dispose of all or any property vested in him, as he may think proper, subject to any restriction which may be imposed in this behalf by the will of the deceased, and subject to this section:
>
> Provided that an executor may dispose of any property notwithstanding any restriction so imposed, if he does so in accordance with an order of the Court.
>
> (4) An administrator may not, without the previous permission of the Court —
>
> (a) mortgage, charge or transfer by sale, gift, exchange or otherwise any immovable property situate in any State and for the time being vested in him; or

(b) lease any such property for a term exceeding five years.

[47] An important requirement to note in s 60(3) and (4) is that before the executor or the administrator of the estate may sell the property of the deceased, the property must first vest in them. This is also seen in s 68 of the PAA 1959 (Revised 1972) which provides that the personal representatives of the deceased must hold the property before proceeding to sell it or deciding to delay the sale:

68 Duties of representative

(1) On the death of a person intestate as to any property, the property shall be held by his personal representatives —

(a) as to the immovable property upon trust, subject to section 60, to sell the same; ...

[48] Section 346 of the National Land Code ('the NLC') provides that no personal representative of a deceased may sell land until his name has been registered upon the title as representative, pursuant to the procedure provided:

346 Registration of personal representatives

(1) The personal representative or representatives of any deceased person may apply to the Registrar under this section to be registered as such in respect of any land, or share or interest in land, forming part of that person's estate; and the Registrar, if satisfied that any estate duty due in respect of the estate has been paid, or a postponement of payment allowed in respect of the land, share or interest in question, shall give effect to the application in accordance with the provisions of sub-sections (3) and (4).

(2) *Any such application shall be accompanied by —*

(a) *the grant of probate or letters of administration;*

(b) if available, the issue document of title to the land or, where the application relates to a lease or a charge, the duplicate thereof; and

(c) such other documents or evidence as the Registrar may require, or as may be prescribed.

(3) *The Registrar shall give effect to any such application by endorsing on the register document of title to the land to which, or a share or interest in which, it relates a note of the date of death of the deceased person and a memorial to the effect that the said land, share or interest is vested in the applicant or applicants 'as representative' or, as the case may be, 'as representatives'.*

(4) Every such memorial shall be signed and sealed by the Registrar, and a copy thereof shall be made on the issue document of title or, as the case may be, duplicate lease or charge, if sent with the application or subsequently obtained by him.

(5) *No personal representative or representatives shall be capable of executing any instrument of dealing in respect of any land, share or interest until it has become registered in his or their name or names pursuant to this section.* (Emphasis added.)

[49] We emphasise that an application under s 346 of the NLC MUST be accompanied by the grant of probate or letters of administration pursuant to s 346(2) which utilises the mandatory word 'shall'. Therefore, at the risk of belabouring the point, until the grant of letters of administration, the personal representatives of the deceased cannot even apply for their names to be registered upon the issue document of title as provided for in s 346(3), let alone sell the deceased's property.

[50] In this case, it is not disputed that the vendors were mere beneficiaries of the estates of Chong Siew Koey and Choong Siew Thean, who both passed away intestate. At the time the SPA was executed, the grant of letters of administration had not been obtained. We are of the view that beneficiaries were not entitled to sell their future rights in immovable property in the deceased's estate.

[51] We are supported in our conclusion by two cases cited to us by learned counsel for ARB — the Federal Court decision of *Chor Phaik Har v Farlim Properties Sdn Bhd* [1997] 3 MLJ 188 and the Court of Appeal decision of *Goh Keat Poh & Ors v Farlim Properties Sdn Bhd and other appeals* [2009] 5 MLJ 449; [2012] 10 CLJ 70. Both these cases involved the same property and parties. These cases stated that a beneficiary has no title or interest in property in the deceased's estate until the estate had been fully administered and distributed according to law. Therefore, a beneficiary cannot make any covenant to convey title in the property to other parties.

[52] The background facts in those two cases are similar to the present case. A deceased who died intestate held a 75% undivided share in certain lands. Some (but not all) of the deceased's beneficiaries entered into sale and purchase agreements to sell their undivided shares in the lands to a company. These SPAs were executed before the administration of the deceased's estate had been completed and distribution to the beneficiaries of the proportions of the lands to which they were entitled, was made according to law. Chor Phaik Har was one of the original parties to the SPAs but later refused to sign the SPAs and lodged a caveat on the lands. The company which bought the lands, Farlim, applied to remove the caveat. The High Court allowed the application for removal but upon appeal, the Federal Court in *Chor Phaik Har* (above) allowed the caveat to remain.

[53] The beneficiaries then sold the lands to another party. Farlim brought a claim for wrongful termination of the SPAs which it executed with the beneficiaries. The High Court held that the SPAs were wrongfully terminated and were valid because what the beneficiaries had sold was their 'spes successionis' in the lands (ie an expectation of succeeding to property). Upon appeal to the Court of Appeal, the decision of the High Court was reversed. This is the case of *Goh Keat Poh* (above). The Court of Appeal applied the Federal Court decision in *Chor Phaik Har* (above) and held that the proposition enunciated there was binding, which rendered the claim by Farlim res judicata.

[54] Applying the principle laid down in *Chor Phaik Har* (above) and *Goh Keat Poh* (above), the vendors in our present case were not entitled to sell their future interest in the properties which they expected to inherit. They should have waited until the grant of the letters of administration was issued and after the appointed administrator completed the distribution of the properties to them, before executing any sale and purchase agreements in respect of the estate properties.

[55] For the reasons cited above we are unable to concur with learned counsel for the respondent that these are contingent contracts, and more importantly that the respondent had the requisite capacity to contract. This is an issue of law that does not require a trial. The position in law is trite, namely that letters of administration have to be issued and the property distributed before the beneficiaries can sell the subject land. Therefore the learned judicial commissioner erred in failing to recognise the primary issue before the court. The net result is that the SPA is null and void for lack of capacity.

[56] Since we have determined that the SPA is void, the plaintiff's action in seeking specific performance of the SPA is obviously unsustainable according to the trite principle enunciated in the Supreme Court case of *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36, which has been applied in numerous other appellate court cases such as the recent Federal Court case of *Tan Wei Hong (a minor suing through guardian ad litem and next friend Chuang Yin E) & Ors v Malaysia Airlines Bhd and other appeals* [2019] 1 MLJ 59; [2018] 9 CLJ 425; [2018] 1 LNS 1274; the Court of Appeal in the cases of *Om Cahaya Mineral Asia Bhd v Damansara Realty (Pahang) Sdn Bhd* [2019] 1 MLJ 683; [2018] 5 CLJ 587; [2017] 1 LNS 2027; *Norihan bt Talib (sued in her personal capacity and trading under the name 'Tanjung Trading') & Ors v Mohd Nasir bin Hassan & Ors (suing on their own behalf and for 420 others as per list at 'Appendix A') and another appeal* [2018] 3 MLJ 670; [2018] 2 CLJ 66; [2017] 1 LNS 1274; *Kalung Makmur Sdn Bhd v Lo Yen Nyuk* [2018] 2 MLJ 428; [2018] 1 CLJ 459; [2017] 1 LNS 1072; and *Datin Paduka Phang Oi Choo @ Phang Ai Tu v Tan Sri Datuk G Gnanalingam*

and other appeals [2017] 5 MLJ 800; [2017] 5 CLJ 1; [2017] 1 LNS 282 to name but a few.

[57] In the recent Federal Court case of *Tan Wei Hong* (above), Ramly Ali FCJ summarised the applicable principles as follows:

> [16] The principle for striking out of pleadings pursuant to O 18 r 19 of the ROC is well settled. It is applicable only in a plain and obvious case or where a claim is, on the face of it, obviously unsustainable (see: *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36; [1993] 4 CLJ 7 (SC); *Hubbuck & Sons Ltd v Wilkinson, Heywood & Clard Ltd* [1899] 1 QB 86; *Attorney General of the Duchy of Lancaster v London and North Western Railway Company* [1892] 3 Ch 274).
>
> [17] The tests for striking out application under O 18 r 19 of the ROC, as adopted by the Supreme Court in *Bandar Builder* are, inter alia, as follows:
>
> (a) it is only in plain and obvious cases that recourse should be had to the summary process under the rule;
>
> (b) this summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it obviously unsustainable;
>
> (c) it cannot be exercised by a minute examination of the documents and facts of the case in order to see whether the party has a cause of action or a defence;
>
> (d) if there is a point of law which requires serious discussion, an objection should be taken on the pleadings and the point set down for argument under O 33 r 3 of the ROC; and
>
> (e) the court must be satisfied that there is no reasonable cause of action or that the claims are frivolous or vexatious or that the defences raised are not arguable.
>
> [18] The Court of Appeal in *Sivarasa Rasiah & Ors v Che Hamzah Che Ismail & Ors* [2012] 1 MLJ 473; [2012] 1 CLJ 75, had adopted the well-settled principle of striking out in the following passage:
>
> A striking out order should not be made summarily by the court if there is issue of law that requires lengthy argument and mature consideration. It should also not be made if there is issue of fact that is capable of resolution only after taking viva voce evidence during trial, (see; *Lai Yoke Ngan & Anor v Chin Teck Kwee & Anor* [1997] 2 MLJ 565; [1997] 3 CLJ 305 (FC)).
>
> [19] The basic test for striking out as laid down by the Supreme Court in *Bandar Builder* is that the claim on the face of it must be 'obviously unsustainable'. The stress is not only on the word 'unsustainable' but also on the word 'obviously', ie, the degree of unsustainability must appear on the face of the statement of claim without having to go into a lengthy and mature consideration in detail. If one has to go into a lengthy detailed argument and mature consideration of the issues of law and/or

fact, then the matter is not appropriate to be struck out summarily. It must be determined at the trial.

[58] On this ground we allowed the appeal. If the SPA is upheld as a valid contract, it would defeat the legislation we have set out above which provides that where a deceased died intestate, only his personal representative may sell the immovable property in the estate, and that too with permission of court. Beneficiaries do not amount to personal representatives under the PAA 1959 (Revised 1972). If beneficiaries were allowed to sell land of deceased persons who died intestate, it would put them on the same footing as executors who obtain the power to deal with the deceased's properties from the will. This amounts to circumventing the provision which stipulates that administrators must obtain sanction from court before selling property of the deceased, as beneficiaries would then escape the requirement to take out grant of letters of administration, and to register their status as representatives upon the original issue document of title under s 346 of the NLC.

[59] As we have discussed above, it is evident from the legislation and case law that the vendors in this case had no legal right to sell the properties in the unadministered estates of Chong Siew Koey and Choong Siew Thean. They should have only executed the SPA after the estates of both deceased persons had been fully administered and the properties distributed to them as beneficiaries. Therefore, the striking out application filed by ARB should be allowed.

CONCLUSION

[60] For the reasons we have stated above, we found that there were merits in this appeal. We allowed the appeal and set aside the decision of the High Court with costs of RM7,000 to the appellant (ARB), subject to allocatur. The deposit is refunded.

Appeal allowed and decision of High Court set aside.

Reported by Nabilah Syahida Abdullah Salleh